Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6206

EZRA CHARLES BRANTLEY,
Petitioner,

v.

CITY OF DALLAS,
Respondent.

On Petition for a Writ of Certiorari
On Appeal From the Supreme Court of Texas

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

Petitioners' appeal herein challenges the constitutionality of Sections 1 and 6, CHAPTER XXVIII of the Charter of the City of Dallas.

Section 1 of CHAPTER XXVIII provides:

> "NOTICE REQUIRED — PERSONAL INJURY — The City of Dallas shall never be liable for any personal injury, whether resulting in death or not, unless the person injured, or someone in his behalf, or in the event the injury results in death, the person or

persons who may have a cause of action under the law by reason of such death injury, shall file a notice in writing with the City Manager or City Secretary within thirty (30) days after the same has been received, stating specifically in such notice, when, where, and how the exact injury occurred, and the full extent thereof, together with the amount of damages claimed or asserted."

Section 6 of CHAPTER XXVIII provides:

"WAIVER OF NOTICE — Neither the Mayor, any City Councilman, the City Manager, the City Secretary, the City Attorney or any other officer or employee of the City of Dallas, shall have the authority to waive any of the provisions of this chapter, but the same may be waived only by the resolution of the City Council made and passed before the expiration of the said thirty (30) day period provided for in the above sections, which resolution shall be evidenced by the Minutes of the City Council. Such waiver shall never be made in regard to claims arising out of the immediately preceding section 5."

QUESTIONS PRESENTED BY PETITIONERS

(1) Does the thirty (30) day notice provision contained in the City of Dallas Charter violate the Fourteenth Amendment to the United States Constitution?

(2) Does the thirty (30) day notice requirement contained in the City of Dallas Charter violate the Seventh Amendment to the United States Constitution?

STATEMENT OF THE CASE

On or about December 3, 1971, Ezra Charles Brant-

ley was an employee of the City of Dallas working in the Street Maintenance Division of the Public Works Department. On December 9, 1971 Brantley reported to his superior that he had been hurt on the job on December 8. (Tr. 15) He was sent to a general practitioner who referred him to an orthopedic specialist, Dr. Howard Y. Sigler, on December 13, 1971. Brantley was subsequently hospitalized and treated by Dr. Sigler. He requested, and obtained several passes to leave during the time he was hospitalized. He was released on January 6, 1972 upon Dr. Sigler's recommendation that he was able to return to work. (Tr. 38, 39)

The City paid all hospital and doctor bills incurred by Brantley from the date he reported an injury until January 6, 1972, when the attending physician determined that Brantley was able to return to work. (Tr. 41-44)

Brantley's written notice of claim was filed with the City Manager on February 16, 1972 — seventy-four (74) days after December 3, 1971, the date Brantley's injuries were alleged to have occurred. (Tr. 65)

Defendant filed a Motion for Summary Judgment on the basis that Plaintiff had failed to comply with CHAPTER XXVIII, Sec. 1 of the Charter of the City of Dallas and that no waiver of the notice requirements had been made in behalf of the Plaintiff, pursuant to CHAPTER XXVIII, Sec. 6 of the Charter. (Tr. 18-20)

Summary Judgment in favor of the City of Dallas was granted by the trial court. (Tr. 83) That judgment was affirmed by the Court of Civil Appeals (Appendix B), and Petitioner's Application for Writ of Error was refused by the Supreme Court of Texas, No Reversible Error (Appendix F).

ARGUMENT AND AUTHORITIES

I.

The Eleventh Supreme Judicial District Court of Civil Appeals of Texas Made a Correct Statement of the Texas Law in Its Opinion By Its Statement That "The Rule Is Well Established in Texas That Charter Provisions Requiring Written Notice of an Injury Within A Fixed Time Are Valid and Compliance Is A Condition Precedent to the Maintenance of an Action Against the City," and Correctly Affirmed the Judgment of the Trial Court: The Supreme Court of Texas Was Correct in Refusing Petitioner's Writ of Error, No Reversible Error.

The Supreme Court of Texas has consistently upheld the validity of Charter provisions requiring notice of an injury within a given time and the requirement that compliance therewith is a condition precedent to the maintenance of an action for such injury. *City of Dallas v. Shows,* 212 S.W. 633 (Comm. App., 1919, judgment adopted by the Supreme Court); *Cawthorn v. City of Houston,* 231 S.W. 701 (Comm. App., 1921, judgment adopted by the Supreme Court); *City of Terrell v. Howard,* 111 S.W. 2d 692 (Comm. App., 1938, opinion adopt-

ed by the Supreme Court); *Phillips v. City of Abilene,* 195 S.W. 2d 147 (Tex. Civ. App. 1946, writ ref'd.); *City of Houston v. Hruska,* 283 S.W. 2d 739 (Tex. 1955); *Barrett v. City of Dallas,* 490 S.W. 2d 605 (Tex. Civ. App. 1973, n.w.h.).

Three of the above cases have a direct bearing, by virtue of quite similar situations, on the case at bar.

In *Phillips v. City of Abilene,* supra, the Plaintiff filed a damage suit against the city for personal injuries. The city contended that Plaintiff had failed to comply with the charter notice requirement, which contained a mandatory non-waiver provision similar to the City of Dallas' Charter sections which are controlling in this case. Plaintiff asserted substantial compliance with the charter provision because on the day after the accident in question, he went to the office of the Mayor (The charter provision specified notice in writing within thirty days to the Mayor or to the Board of Commissioners), and told the Mayor personally the date on which his wife stepped into a water meter, where and how the accident occurred, and that she was injured as a result. The Mayor jotted down some notes as Plaintiff talked to him and told Plaintiff he would "present this to the Commission." Plaintiff further asserted waiver of the notice requirement due to the acts and conduct of the Mayor, and asserted that the city was estopped, due to the Mayor's acts and conduct, to assert the defense of no notice. The Court of Civil Appeals at Eastland upheld judgment n.o.v. for the Defend-

ant on the ground that there was no fact issue concerning notice — Plaintiff had failed to comply with a condition precedent, the filing of notice pursuant to the city charter provision, as a matter of law. The following excerpts from the *Phillips* opinion demonstrate conclusively that Plaintiff's contentions in this lawsuit are without merit and cannot operate to constitute compliance with the City of Dallas notice provision, even if all of the allegations by Plaintiff are taken as proven facts. The opinion also establishes that no assertions of waiver or estoppel can be maintained in this action since the City of Dallas Charter contains a mandatory non-waiver provision.

> "The law is well settled in Texas that an ordinance such as the one involved here, requiring a written claim for personal injury against the city to be filed within thirty days, is mandatory, and that such filing is a condition precedent before a suit can be maintained against the city for such injury. [p. 148]
>
> * * *
>
> It is further well settled that actual knowledge of the city officials of all of the facts necessary to be stated in this notice is not sufficient to comply with the law that requires that the notice be in writing and presented to the city commission. [p. 148]
>
> * * *
>
> As will be seen from reading the ordinance with reference to the written notice, it provides that the provisions thereof cannot be waived by an officer or employee of the city, but may be waived only by resolution of the Board of Commissioners. [p. 150]
>
> * * *

> If it should be held that the City was estopped by reason of the acts and conducts of the Mayor and City Commissioners, then that portion of the ordinance that prohibits a waiver of the written notice would be nullified. The doctrine of estoppel cannot be invoked to nullify a mandatory statutory restriction. . . . The city cannot be estopped by unauthorized acts of its officers." [p. 150]

The Supreme Court of Texas, in *City of Houston v. Hruska,* supra, expressly approves the *Phillips* opinion. In the *Hruska* case it was contended, and the jury found, that the Plaintiff was lulled into a false sense of security by the acts and conduct of city employees, which caused him as a reasonably prudent person not to file his claim until a year after the accident in question and a week after his salary was discontinued. The Plaintiff was a city employee who had been kept on the city's payroll (with the notation "Injured") for approximately a year, without his doing any work for the city during that period. The Supreme Court, after reaffirming the validity of the notice requirement and the mandatory non-waiver provision, held that the city could not be estopped to assert as a defense its charter provision requiring written notice of claim.

As recently as January of 1973, the requirement to file written notice of claim pursuant to an applicable charter provision was upheld. *Barrett v. City of Dallas,* supra, involved a suit against the City of Dallas to recover damages for personal injuries allegedly suffered by the Plaintiff while employed by the city. The Plaintiff contended that "by hav-

ing established a custom, practice, and policy of payment of medical expenses for injured employees, which lulled him into believing that it would not be necessary for him to file his claim at any certain time, Appellee was estopped to demand strict compliance with the notice provision." In the *Barrett* opinion the Dallas Court of Civil Appeals held that the charter provisions in question are valid and that compliance therewith is mandatory. The court further held that by virtue of the mandatory non-waiver provision, the acts of the city and city employees which were complained of could not estop the city from asserting non-compliance with the notice provision.

> "[P]ayment of medical expenses 'is simply not a representation that notice of a claim for *damages* is waived.' He knew the city was paying his medical expenses, but this gave him 'no reason to be misled about notice of a claim he might file for damages at common law.'
>
> * * *
>
> Appellee's custom to pay medical expenses of its employees injured in line of duty, even though administered by duly authorized agents of Appellee, is not such conduct of the city as would be any evidence of waiver or any basis for application of the doctrine of estoppel, not because the payment for the medical expenses was not authorized, but because Section 6, of Chapter XXVIII, of the Charter sets forth an exclusive means of waiving the notice provision in Sec-1, a method entirely different from the acts relied on by Appellant.
>
> Dallas is a home-rule city, and Appellant is charged with knowledge of the provisions of its Charter. His position must therefore be assessed as though he had

> actual knowledge thereof. Knowing that the Charter required him to file written notice of his claim within thirty days after his injury, and also knowing that no officer or employee of Appellee had authority to waive that requirement, and that it could be waived only by resolution of the City Council passed within the thirty days, Appellant is in no position to assert that Appellee's custom of paying medical expenses over a period exceeding the thirty day period constituted a representation to him that the city would do what he knew it could not do by that means, i.e., waive compliance with the notice provision of the Charter."

The summary judgment proof on file shows conclusively that Appellant failed to comply with the requirements of the applicable charter provisions. As a result, there is no genuine issue as to any material fact, and the Summary Judgment granted Respondent by the trial court was proper.

* * *

Petitioner, in his brief at Page 10, argues that "by violating Petitioner's U. S. Constitutional guarantees of equal protection and due process of the Fourteenth Amendment and of the right to trial by jury or in the alternative to a fair trial of the Seventh Amendment, the City is now estopped to come back and claim that the Petitioner did not file written notice." Contrary to his statement by Petitioner, the Texas Cases have consistently maintained that the City cannot be estopped by unauthorized acts of its officers. Where, as here, a mandatory non-waiver provision exists and no waiver has been made by a City Council Resolution, city employees have no authority

to waive the notice provision and no authority to effect an estoppel. *Phillips v. City of Abilene,* supra; *City of Houston v. Hruska,* supra; *Barrett v. City of Dallas,* supra.

For the proposition that the City may be estopped, the Petitioner quotes from *Phillips v. City of Abilene,* at page 11 of his brief. The *Phillips* quotation taken in context, shows that it does not represent any authority for the proposition that the City could be estopped from asserting non-compliance with the notice provision in the case at bar. The quotation in context reads as follows:

> "We believe that under some facts and circumstances the City may be estopped from pleading the ordinance requiring written notice. It was so held in the case of *Cawthorn v. City of Houston,* Tex. Com. App., 231 S.W. 701. *But that case is distinguishable from the case at bar upon the facts. In the Cawthorn case there was no ordinance prohibiting the City Commission from waiving a compliance with the ordinance requiring written notice.*" (Emphasis added)

II.

Section 1, Chapter XXVIII and Section 6, Chapter XXVIII of the Charter of the City of Dallas Are Not Violative of the United States Constitutional Guarantees of Equal Protection and Due Process of Law Under the Fourteennth Amendment and the Right to a Fair Trial by Jury Under the Seventh Amendment, and the Cases Relied on by Petitioner Are Distinguishable From the Case at Bar.

As a general rule statutes requiring that a notice, demand or claim shall be given, made or presented, and

also similar charter provisions adopted by municipalities pursuant to due authorization, are mandatory and create conditions precedent, and a failure to comply with such a provision defeats recovery. 64 *Corpus Juris Secundum* Sec. 2199. Notice of claim provisions are found in most states and they are consistently upheld as valid and constitutional. 18 *McQuillan on Municipal Corporations* (3rd Edition Revised) Sec. 53.152, 53.154. The above cited sections from *McQuillan* list more than twenty-five states which uphold notice of claim provisions. Many jurisdictions have upheld the validity and constitutionality of notice of claim provisions within the past few years. *England v. City of Richmond,* 419 F. 2d 1156 (7th Cir. 1969), *Bituminous Cas. Corp. v. City of Evansville, Indiana,* 191 F. 2d 572 (7th Cir. 1951), *Kilaru v. Watts,* 339 F. Supp. 1362 (E.D. Wisconsin, 1972), *Fisher Contracting Company v. Housing Authority of the City of Plymouth,* 329 F. Supp. 1028 (E.D. Wisconsin, 1971), *Jewell Ridge Coal Corp. v. City of Charlotte, North Carolina,* 204 F. Supp. 256 (W.D. North Carolina, 1962), *Repaskey v. Chicago Transit Authority,* 293 N.E. 2d 440 (Appellate Court of Illinois, 1973), *City of Louisville v. O'Neill,* 440 S.W. 2d 265 (Court of Appeals of Kentucky, 1969), *Floyd v. City of Butte,* 412 P. 2d 823 (Supreme Court of Montana, 1966), *Maier v. City of Ketchikan,* 403 P. 2d 34 (Supreme Court of Alaska, 1965).

Sections 1 and 6 of CHAPTER XXVIII of the Charter of the City of Dallas, having uniform application to all

claimants, *sui juris,* against the City of Dallas, do not violate the constitutional guarantee of equal protection of the laws. Nor do those sections violate the due process guarantee. Petitioner was afforded a means, through statute, by which to pursue his claim against the City.

The Charter provisions are not violative of the constitutional guarantee of the right to trial by jury. The trial court, the Court of Civil Appeals, and the Supreme Court of Texas found that no genuine issue as to any material fact existed in the instant case. Unless a fact issue exists in a case there is no right to a trial by jury.

* * *

Petitioner cites two cases decided by Michigan courts in support of his contention that the City of Dallas notice provision is unconstitutional. The Supreme Court of Michigan, in *Reich v. State Highway Department,* 194 N.W. 2d 700 (Mich. 1972), held that the sixty-day notice provision of the State Tort Claims act violated the equal protection guarantee of the state and federal constitutions. The court reached this decision by reasoning that when the legislature passed the Tort Claims Act waiving governmental immunity, it *intended* to put governmental tort-feasors on an equal footing with private tort-feasors. Since the legislature's *intention* was to place victims of negligent conduct on equal footing, the court reasoned that the sixty-day notice requirement would act to bar the actions of governmental negligence after sixty days

but the victims of private negligence would have three years in which to bring their actions.

The reasoning of the *Reich* case is not applicable to the case at bar. The instant case involves street maintenance, which is a proprietary function of the city. Our state legislature has expressed no intention, through any nature of legislation concerning proprietary functions such as this, to "place victims of negligent conduct on equal footing" as in *Reich*. Cities have never been protected by the Doctrine of Governmental Immunity in connection with suits arising out of proprietary functions. Cities have always been subject to liability arising out of their own negligence as well as the negligence of their employees when involved in proprietary functions, yet claimants still have been required to comply with notice provisions as a condition precedent to the bringing of suit.

Moreover, the Texas Legislature has expressed no intention to place victims of negligent conduct on equal footing as far as giving notice of claim is concerned. Article 6252-19, Tex. Rev. Civ. Stat. Ann., known as the Texas Tort Claims Act, provides for waiver of governmental immunity under certain enumerated, but not all, circumstances and places a limit on the amounts recoverable under the Act. The Act provides for a notice of claim (within six months from the date of the incident) to be given to the applicable governmental unit and, in Sec. 16, expressly ratifies and approves existing provisions of cities requiring notice within a specified period

of time. In addition, the act specifically excludes any application of its terms to proprietary functions of a municipality. This exclusion indicates that the intention of the Texas Legislature, rather than to effect any change in the law concerning proprietary functions, is to maintain the present status of tort law applicable to suits involving proprietary functions. This, of necessity, would include the intention to continue to uphold and approve City Charter provisions requiring notice of claim.

It should be noted here that the City of Dallas Charter provision in question was recently amended to provide for a notice of claim within six months of the incident complained of. This change became effective June 19, 1973, and the thirty-day provision in issue here is no longer applicable.

Petitioner argues that the City's notice provision constitutes a statute of limitations. The case of *Cooper v. Westchester County*, 39 F. Supp. 58 (S.D. N.Y. 1941) discussed the constitutionality of a notice provision similar to that of the City of Dallas and met the argument that the provision constituted a statute of limitations, at page 61:

> "A provision requiring the filing of notice of claim and the service of notice of intention to sue is not to be regarded as a short statute of limitations. All conditions imposed by the legislature upon the qualified right to sue are essential prerequisites. [Citing cases] The statute is not arbitrary but provides a check demanded by public necessity against unscrupulous raids

> upon the public purse by means of fraudulent claims. . . . There is no deprivation of property without due process as Plaintiff is afforded an opportunity, though restricted, to obtain compensation for claimed wrongs. The statute is 'rooted in public needs' and is valid exercise of the power of the State.

Compliance with the notice provision is merely a condition precedent to the bringing of suit against the City; and the Plaintiff in a personal injury action against the city, as well as in suit against private individuals, still has two years in which to bring suit. Furthermore, any failure by the Plaintiff to comply with the notice provision has no affect on his right to sue any city employees against whom he may have a cause of action. The city's notice provision, as well as statutes of limitations, are statutory in nature and constitute legislative determinations. Petitioner's theory could be carried to the point of arguing that various periods of limitations divide potential persons into classes, and that the court should throw out all differentials in statutes of limitations. This would result in judicial determination of statutes of limitations, where it is the legislature which possesses the authority to make or change such laws.

Petitioner next discusses the case of *Galbreath v. City of Indianapolis*, 255 N.E. 2d 225 (Ind. 1970) to support his contentions that the City of Dallas notice provision is unconstitutional and that the city should be estopped to assert non-compliance therewith. That case involved a City of Indianapolis notice provision which contained

no mandatory non-waiver provision. No constitutional challenge to the notice provision was asserted. The Indiana court based its decision on the doctrine of substantial compliance. The Texas courts have affirmatively rejected adoption of the substantial compliance doctrine with regard to notice provisions. *Phillips v. City of Abilene,* supra.

Stone v. District of Columbia, 237 Fed. 2d 28 (D.C. Cir. 1956, Cert. Den. 77 S.Ct. 221), cited by Petitioner at page 16, was decided on the basis of statutory construction. The court held that Section 1-301 of the D.C. code (which provided that the corporation council would have charge and conduct of all law business of the district and of all suits instituted by and against the government thereof) made notice to the corporation council, if otherwise adequate, equivalent to the notice to the commissioners under Section 12-208.

In *Rabinowitz v. Town of Bay Harbor Islands,* 178 So. 2d 9 (Florida 1965), also cited at page 16, the Supreme Court of Florida held that where the agents and employees of the town had the authority to waive the notice provision, that the town could be estopped by their actions and representations. The town's charter did not contain a mandatory non-waiver provision.

Petitioner, at page 18 of his brief, quotes the following from *City of Terrell v. Howard,* supra:

> ". . . The effect of the amendment viewed in its entirety is clearly to violate plaintiff's constitutional guarantee that 'all courts shall be open, and every

> person for an injury done him, in his . . . person . . . shall have remedy by due process of law.' Const. Tex. Art. 1, Section 13.

"The amendment" referred to in the foregoing quotation was a City of Terrell ordinance providing that "no suit for damages for any injury to any person or property shall be brought against the City of Terrell without first obtaining the consent of the Commissioners, or a majority thereof, at a regular meeting to bring said suit." The court went on to uphold the City's thirty-day notice provision as a condition precedent to the bringing of suit against the city.

CONCLUSION

The Courts of Texas, as well as other jurisdictions, have consistently upheld the validity of Municipal Charter provisions requiring notice of claim to a specified city officer within a specified period of time after injury or damage has occurred. They have also upheld the validity of the mandatory non-waiver provision. Petitioner has cited no applicable opinions which support his position.

The trial court properly granted Respondent's Motion for Summary Judgment on the basis that there was no genuine issue as to any material fact, Petitioner having failed to comply with CHAPTER XXVIII, Section 1 of the Charter of the City of Dallas, a condition precedent to the filing of his suit herein. The Court of Civil Appeals

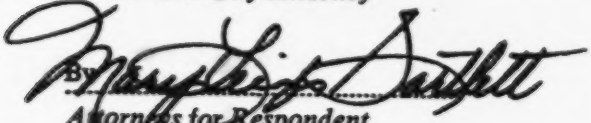
properly affirmed that judgment and the Supreme Court was correct in finding "No Reversible Error."

WHEREFORE, Respondent City of Dallas prays that this Honorable Court in all things deny Petitioner's Writ of Certiorari.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney of the City of Dallas

MARY LEIGH BARTLETT,
Assistant City Attorney

By 
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CERTIFICATE OF SERVICE

I, Mary Leigh Bartlett, Attorney for the City of Dallas, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of February, 1974, I served three (3) true and correct copies of the foregoing Brief of the Respondent in Opposition to Petition for Writ of Certiorari to Mark Delk, Attorney for Petitioner, 4314 Republic National Bank Tower, Dallas, Texas 75201, by depositing same in the United States Mail, postage prepaid.

Mary Leigh Bartlett